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THE FUTURE OF CALLINGS—AN INTERDISCIPLINARY SUMMIT ON THE PUBLIC OBLIGATIONS OF PROFESSIONALS INTO THE NEXT MILLENNIUM:

ETHICS AND ENFORCEMENT

Edward J. Cleary† and William J. Wernz‡

Ethics cannot be summed up in a series of inviolate rules or commandments which can be applied everywhere and always without regard to circumstances, thought of consequences, or comprehension of the ends to be attained. What is universal is the good in view, and ethical rules are but the generally approved ways of preserving it. The rules may clash with one another, and then the only way out is to look for guidance to the ideal.1

Dean Pirsig's statement of the tension between the good sought by ethics, and mere rules which imperfectly embody the good, is but the first of several dualities around which the twenty-seven-year history of Minnesota's lawyers professional responsibility system has revolved. Robust debate about the proper places and weights to be assigned to these competing principles has shaped our idea of professional responsibility.

Consider, as a first example, that the purpose of the professional responsibility system is said to be protection of the public by vigorous enforcement of minimum disciplinary standards. This central purpose, however, has been balanced in different ways with

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sometimes competing purposes: concern for damage to an innocent lawyer's reputation by premature disclosure of an investigation; the unfairness of severe discipline to a lawyer whose behavior is explainable by chemical dependency, disability, and other human frailty; and the competition for resources between disciplinary and educational programs.

Just as the history of professional responsibility has in part been written by the competition between different purposes, so too have the voices of different participants and constituencies in the system contended for attention: the public, the Board, the Director, bar associations, the Minnesota Supreme Court and—indirectly—the United States Supreme Court, and ad hoc outside review groups. The public has asserted its role in several ways: as the principal object of protection from unethical lawyers; through occasional, largely unsuccessful, legislative attempts to regulate the profession; and, increasingly over the years, through membership on the Lawyers Board and District Ethics Committees. The Minnesota Lawyers Board currently has nine public members out of its twenty-three positions. This is the largest proportion of public members since the mid-1980s of any Minnesota professional board, and of any lawyer discipline board in the United States.

The Minnesota State Bar Association and its District Ethics Committees nonetheless continue to play vital roles. The MSBA proposes most of the ethics rules and nominates many of the Lawyers Board members. The District Ethics Committees, through volunteer efforts, continue to provide initial review for most of the complaints that are investigated. The American Bar Association has deeply affected the Minnesota system by promulgation of various model professional standards, especially the model ethics rules.

The Minnesota Supreme Court, while ultimately responsible for the professional responsibility system, cedes much of its authority to the other system participants. The court still decides all public discipline cases, adopts all procedural and substantive rule changes and appoints board members and Directors. The United States Supreme Court, mainly through several First Amendment opinions on lawyer advertising, solicitation and other topics, has also profoundly influenced the development of the professional responsibility system.

2. See <http://www.courts.state.mn.us/lprb/ablprb.html> for a listing of current board members.
Ad hoc independent review groups have also written much of the professional responsibility system's history. The 1981 ABA review and the 1985-86 Supreme Court Advisory Committee, chaired by Nancy Dreher, were enormously important in making the system more open to the public, in providing adequate staffing and in establishing procedures which balanced fairness and the need for prompt action in serious cases. A second Supreme Court Advisory Committee, chaired by Robert Henson and Janet Dolan in 1993, further opened the discipline process to the public and experimented with alternatives to discipline, such as mediation and mandatory fee arbitration.

The generally fruitful tension between the respective roles of the Lawyers Board and its Director also produced its share of the professional responsibility system's history. The Director's various titles, "Administrative Director," "Director of Lawyers Professional Responsibility," and since 1985, "Director of the Office of Lawyers Professional Responsibility" show the evolution of the Director's role from administrator, to center of the system, to the director of one extremely important part of the system.

Several overall trends also mark the history of the professional responsibility system. They include:

- Increasing public access.
- Increasing specificity in substantive and procedural rules.
- Adding to the number of programs. For example, disciplinary probations, advisory opinions, interest on Lawyer Trust Account, Trust Account Overdraft Notification, and Client Security Board.
- Increasing ethics educational efforts.

Before examining these trends and competing principles further in the history of Minnesota's professional responsibility system, it is well to begin with a glance at the period before there was a Minnesota Lawyers Board.

In the early days of the Republic, those who were trained in the law were generally products of the apprenticeship system, taught by the method used to produce solicitors in centuries past in England. In America, it became clear that the division of the bar into solicitors and barristers, prevalent in England, was not practi-
cal; frontier justice did not lend itself to such specialization and those who finished their period of apprenticeship served in both capacities.\(^4\)

In the decades following the Revolution and in the early nineteenth century, the scattering of communities throughout the nation led to a general disbursement of those trained in the law, which, in turn, led to little, if any, bar organization or professional unity.\(^5\) It was only late in the nineteenth century with the advent of the association of the bar of the city of New York in 1870 and the American Bar Association in 1878 that an attempt was made to organize legal practitioners.\(^6\) By the beginning of the twentieth century, state and local bar associations were created and the ABA made its first attempt at adopting a canon of professional ethics.\(^7\)

Essentially aspirational in nature, the canons adopted in 1908 by the ABA were an attempt by the profession to encourage its growing number of practitioners to abide by a set of professional standards.\(^8\) The Minnesota Supreme Court adopted the canons in 1955.\(^9\) In 1969, the ABA took another look at its canons and decided it was time to modernize the legal profession's system of ethical standards enforcement, with the adoption of the Code of Professional Responsibility.\(^10\) The thirty-two canons of professional ethics reemerged as nine canons, supported by legally binding disciplinary rules and aspirational ethical considerations.\(^11\)

Following the adoption of the new Supreme Court rule on professional responsibility and discipline, in 1971, the Minnesota Supreme Court appointed Richey Reavill of Duluth to be the first "Administrative Director." At the time there were approximately 5,000 registered Minnesota attorneys with roughly 500 complaints filed the first year. Reavill began the monthly *Bench & Bar of Minnesota* columns,\(^12\) which have served—through the Bar Association's generous donation of space in its publication—the effort to edu-

\(^4\) See id.  
\(^5\) See id.  
\(^6\) See id. at 62.  
\(^7\) See id.  
\(^9\) See id.  
\(^10\) See id.  
\(^11\) See id.  
\(^12\) See <http://www.courts.state.mn.us/lprb/benchbar.html> to read the monthly professional responsibility columns online.
cate the profession on ethics matters. 13

The first meeting of the Lawyers Professional Responsibility Board was held on February 5, 1971. The creation of the Board and the appointment of its first director marked the foundation of the modern professional responsibility system, built on a single, statewide system for dealing with all ethics complaints, operating according to formal rules, and under the ultimate jurisdiction of the Minnesota Supreme Court. The explosion in the 1960s of the numbers of lawyers and of the social importance of the legal professional, required more systematic regulation than could be given by a non-integrated, volunteer bar association, operating informally through local committees.

Among the Board's first actions was the unanimous adoption of a resolution to find that the failure to file income tax returns, or the filing of fraudulent income tax returns, constituted unprofessional conduct and should be investigated with appropriate disciplinary action to follow. 14 The beginning focus of the Office and the Board was also on lack of communication and neglect on the part of practitioners. The relatively small number of attorneys was reflected in this fairly narrow focus.

From the beginning, the Minnesota system of professional discipline rested on the hard work and willingness to be involved of countless volunteers. Twenty-one district bar association ethics committees throughout the state, made up of lawyers and eventually public members, investigated local complaints and made recommendations to the Office. As the first Director stated:

They serve without any compensation except the knowledge that their activities benefit the public, the profession, and the courts. They are performing their duties efficiently, courageously, and with good judgment. The profession owes them a great debt of gratitude. 15

By October of 1972, the Board of Professional Responsibility began a policy of issuing Opinions to serve as "guidelines for the

14. See id.
conduct of lawyers in the State of Minnesota.” For example, in December of 1987, lawyers were given notice with an amendment to Opinion No. 1 that "failure to comply with the standards set forth in these Opinions" would subject the lawyer to discipline. There are presently eighteen formal Board Opinions, dealing with a variety of issues, especially those which recurrently create friction between attorneys and clients. Minnesota has not followed the pattern of many other states, which issue numerous published opinions. Minnesota tends to address these issues through telephone advisory opinions and through the columns of the Director's Office in Bench & Bar of Minnesota and, more recently, in Minnesota Lawyer.

From an early date, Minnesota experimented with alternate disciplines and with constructive approaches to clinical dependency, including probation. The first attorney put on probation was placed there due to problems stemming from chemical dependency. Most of the early cases of probation were related to excessive alcohol use; it was at this time that "Lawyers Concerned for Lawyers" was established as an organization created to address chemical use by members of the profession. Over the years, a number of other disciplinary offenses have led lawyers to being placed on probation, including a growing number of offenses related to psychological illnesses.

By the time the first Director retired on February 1, 1974, three lay members had joined fifteen attorneys in constituting the State Board of Professional Responsibility. Over the next two-year period, two Directors served short tenures, Paul Sharood and Harry McCarr.

At the time Walt Bachman became Director in the summer of 1976, new issues had arisen within the professional disciplinary context including solicitation, advertising, trust fund misuse, and conflicts of interest. Some of these changes had occurred through constitutional challenge and resulting case law, including First Amendment decisions that permanently changed restrictions on lawyer advertising and solicitation. Under Bachman's leadership,
the Director's Office more securely established its tradition of vigorously and publicly prosecuting cases of serious lawyer misconduct.

A change in the rules and a shift in power occurred on January 1, 1977, when the Minnesota Rules on Lawyers Professional Responsibility entered a new era. The changes included the requirement that at least twenty percent of the membership of district ethics committees be non-lawyers. Simultaneously, dispositional discretion was removed from the committees, limiting their function to investigating complaints and recommending dispositions to the Director. Complainant appeals were to be handled by the Minnesota Attorney General's office and the Director was now allowed to disclose to the public that a matter was under investigation. Further, private reprimands became private warnings—later to become "admonitions," for "isolated and nonserious misconduct". During the first six months of the operation of the new rules, fifty-one Minnesota lawyers were issued private warnings, primarily for neglect and lack of communication. And as a further sign of the changing times, two warnings that had been issued for soliciting litigation and placing paid advertisements were rendered meaningless once the United States Supreme Court's decision in *Bates v. State Bar of Arizona* provided for such attorney communication.

Director Bachman acknowledged the continuing chemical dependency problems within the profession by suggesting in the fall of 1977 that "almost half of the lawyers in the country against whom serious disciplinary proceedings are brought are known to have problems with the use of alcohol." Speaking of the relatively new group, Lawyers Concerned for Lawyers, and the issues relating to chemically-dependent lawyers and enforcement of ethical rules, he noted that "the fact that a lawyer may have a drinking problem is

22. 433 U.S. 350, 381 (1977) (holding that an advertisement that publicized two attorneys' "legal clinic" and claiming services at "very reasonable" prices was not misleading and fell within scope of First Amendment's protection). However, the Court also held that the First Amendment permits regulation of advertising by attorneys that is false, deceptive or misleading or which concerns transactions which are themselves illegal, and there may be reasonable restrictions on time, place and manner of such advertising. See id. at 382.
not, *ipso facto*, violative of any provision of the Code of Professional Responsibility." 25 Welcoming the role played by Lawyers Concerned for Lawyers, Bachman also noted that "[it] quite rightly does not wish to become an arm of professional discipline." 26

Returning to the issue of advertising, the Minnesota Supreme Court on April 14, 1978, amended the Code of Professional Responsibility to permit "public communications" unless they are "false, fraudulent, misleading or deceptive." 27 This opened the door to both print and media advertising, while maintaining the prohibition against both telephone and in-person solicitation. 28

At the time Michael Hoover was appointed Director in February of 1979, the Office was receiving 600 complaints a year, and the need for further changes in the system was apparent. In May 1981, the Minnesota disciplinary system was evaluated by a number of experts provided by the ABA who strongly suggested that a greater effort be made to disseminate information about the disciplinary system to the public. 29 The Office had also responded to the need for greater openness by adopting a media release policy in September of 1983. 30 Pursuant to that policy, all petitions for disciplinary action which sought an attorney's suspension or disbarment were released to the media at the time of filing with the Supreme Court. Likewise, all orders of the Supreme Court were also released pursuant to this policy. 31

In 1984-85 the attorney registration fee was increased to $70.00, enabling a staff increase sufficient to deal with regulation of a profession that had grown to 13,000 Minnesota lawyers. The Office was able both to reduce the backlog of disciplinary files and to provide other services such as answering numerous advisory opinion requests.

When William J. Wernz became the sixth Director of the Office of Lawyers Professional Responsibility, there were approximately 15,000 attorneys and 1,200 complaints were filed annually. 32
Just as the old ABA canons had endured in the State of Minnesota for fifteen years from only 1955 to 1970, the Code of Professional Responsibility also had a limited life span of a decade and one-half commencing in 1970 and ending in September of 1985 when it was replaced by the Minnesota Rules of Professional Conduct. The Rules of Professional Conduct marked a change in focus. While the earlier canons were aspirational by nature and while the Code had addressed character issues, the Rules, effective in the fall of 1985, as noted by Director Wernz, showed "a marked shift in emphasis from character to competence" moving away from provisions addressing "personal uprightness" to an "emphasis toward a business-like competence in professional dealings." 33

As the substantive Rules addressing lawyers' behavior changed, so did the procedural Rules on Lawyers Professional Responsibility. By the summer of 1986, the Minnesota Supreme Court addressed the findings of the Supreme Court Advisory Committee on Lawyer Discipline. The Director's role and autonomy were narrowed, while the responsibilities of the Lawyers Board and its Executive Committee were strengthened. 34 The Rules streamlined procedures for handling allegations of serious misconduct. For example, the rules provided for immediate suspension upon a referee disbarment recommendation and for bypass of Lawyers Board Panel probable cause hearings where serious misconduct was obvious. 35 Probable cause guarantees as they applied to each charge of a public petition were strengthened. 36 Dismissed complaints were ordered destroyed after three years rather than after five, and they were not to be disclosed under any circumstance. 37 The amendments to the Rules were enacted "to enhance fairness, accountability, and broader sharing of responsibility in lawyer discipline matters." 38 While the Board originally had only three public members out of a membership of nineteen, by 1986 it had nine public members out of a membership of twenty-three.

The mid-1980s also witnessed major, highly publicized cases of

1985, at 27.
35. See id.
36. See id.
37. See id.
38. Id.
attorney misappropriation of client funds, particularly by John Flanagan and Mark Sampson. In addition to disbarment and criminal proceedings, these thefts led to the establishment in 1986 of the Client Security Board, funded by all licensed attorneys and charged with the mandate of paying proper client claims of loss.

The profound changes in the substantive and procedural rules enacted in 1985-87 have stood the test of time. They remain prominent among the essentials of the professional responsibility system today. Credit for instituting these changes goes to numerous volunteers in the systems, but particularly to Lawyers Board Chairs Robert Henson and John Levine; to Supreme Court Advisory Committee Chair, Nancy Dreher; and to Melvin Orenstein, the first Client Security Board Chair. Credit also is due to Minnesota Supreme Court liaisons, Glenn Kelley and John Simonett.

As the seventh director and the first woman to hold the office, Marcia Johnson began administering the Office of Lawyers Professional Responsibility in the fall of 1992. By the time the twenty-fifth anniversary of the Lawyers Professional Responsibility Board was observed in 1996, the world, and the rules governing lawyers, had changed a great deal. Provisions addressing harassment, discrimination, and sexual involvement with clients, nowhere to be seen either under the old canons or the expired Code of Professional Responsibility, now set new boundaries for lawyers. In the months following, the Supreme Court would adopt a new rule providing for the administrative suspension of attorneys who were in arrears in paying child support, while the Board would adopt a new opinion directing a finding of professional misconduct for a lawyer who recorded a conversation without the knowledge of all parties except under certain limited circumstances.

Recommendations of the Henson-Dolan Advisory Committee were adopted and implemented in 1994. These included a rule

39. See In re Flanagan, 374 N.W.2d 268 (Minn. 1985).
40. See In re Sampson, 408 N.W.2d 574 (Minn. 1987); see also William J. Wernz, Client Security Board Report, BENCH & B. MINN., July 1989, at 10.
41. See Wernz, supra note 40, at 10.
43. See MINN. R. PROFESSIONAL CONDUCT Rule 8.4(g) (1996).
44. See id. Rule 8.4(h).
45. See id. Rule 1.8(k).
amendment increasing the availability of the Director's file in public disciplinary matters which indirectly led to increased criminal prosecutions of attorneys who had stolen funds, as prosecutors freely reviewed disciplinary files. Experiments in mediation and mandatory fee arbitration were also attempted. However, it does not appear that the results of these alternatives to discipline were sufficient to warrant continuation of the programs.

By this time, the Office itself had grown from a staff of two attorneys and a supporting staff member, to ten attorneys, five paralegals and ten support staff.

The eighth, and current director, Edward J. Cleary, was appointed in July of 1997. By that time there were over 21,000 registered attorneys, a fourfold increase since the beginning days of the office in 1971. The good news was that the total number of complaints remained relatively stable over recent years at approximately 1,400—the number of complaints in 1997 was the second lowest in ten years. The bad news was that the number of disbarments was soaring—twenty-two over the nineteenth-month period of January 1997 to August 1998. A reasonable inference from those statistics was that the average practitioner was being more careful in complying with the Rules of Professional Conduct, while a core group of attorneys was escalating egregious behavior in defiance of professional restrictions.

The Office's educational efforts have increased in recent years. A trust account brochure was updated to show how trust accounts can easily be maintained on computer. The Office contributes a regular ethics column to the new Minnesota Lawyer publication, addressing practical issues related to ethics complaints. The Minnesota Supreme Court has also increased the ethics requirement for Continuing Legal Education compliance.

The professional responsibility system also increased the level of public participation in its deliberations and its setting of standards. Lawyers Board quarterly meetings have been open to the public for several years. Rule 1.8(k), governing sexual relations between lawyers and clients, was adopted in 1994 after much public discussion. Board Opinion No. 18, on secret recording of conversations, was adopted only after public consultations. Bar association ethics committees and the Board consult on proposed rule

changes.

As the twentieth century comes to a close, the Office of Lawyers Professional Responsibility bears a scant resemblance to the office of the early days. Staffed by twenty-five employees over two floors in the Minnesota Judicial Center, the Office is fully computerized with a web page detailing the Rules, Board Opinions and information concerning the professional disciplinary system. Several databases keep track of all disciplinary records, and hundreds of disciplinary advisory opinions issued each year are soon to be accessible by computer. Soon, interactive video will allow referees from other parts of the state to take testimony without leaving their jurisdiction.

One can only speculate about the future of the disciplinary system for the legal profession in the State of Minnesota. As the number of licensed attorneys continues to increase rapidly in the state, the likelihood of more complaints is high. Many inexperienced members of the profession need direction, preferably from an experienced practitioner or some other mentor. A number of lawyers will find themselves in disciplinary trouble due to chemical use or psychological illnesses. Many skillful practitioners will find themselves subject to a complaint over their careers. Dismissed complaints say little about a lawyer's ethical stance and perhaps more about the lawyer's client selection. Other lawyers will make mistakes of neglect and communication due to laziness or volume pressure. Finally, there will always be some lawyers with no intention of practicing within ethical boundaries or, often times, within the law.

So as the professional disciplinary system greets the new century, those in charge must continue to allocate resources through teaching and other preventive activities to help the practicing bar. Unfortunately, the prosecutorial function of the Office will always remain and will continue to be of crucial importance in protecting the public from those members of our profession who would do them harm.

Looking back over the Lawyers Board's twenty-seven-year history, perhaps the most prominent hallmarks are the vigor and the openness of the professional responsibility system. Important principles have been subject to lively, almost always fruitful debate: how open to the public the system should be, and how far it should pro-

50. See <http://www.courts.state.mn.us/lprb/lprb.html>.
tect the reputation of the wrongly accused lawyer? (public access has steadily increased); what are the exact roles that should be played by bar volunteers, by the Board, by the court, and by the Director? (the volume of complaints has required a central and active Director, but balance and fairness have created procedural safeguards); how far the system should be educational and how far it should be disciplinary? (cases of serious misconduct have been met by firm discipline, but the Board and Director have also been pro-active and have redoubled educational efforts).

About basic principles in the Minnesota system there has been no debate for many years. First, cases of serious misconduct are dealt with promptly, fairly, openly and, for the most part, severely. Clients who have lost money due to their lawyer’s dishonesty are made whole to a degree—up to $100,000 a claim—which is unsurpassed in the United States. Second, the health and vitality of the Minnesota system are a product of its many contributors: the court, the Boards, the Bar, the Director, and the Director’s staff, and above all, the volunteers at all levels. Third, while the Minnesota history of professional responsibility is one of steady, almost constant change, the basic elements have long been in place and remain unchallenged: a single, unified, state-wide system; a vigorous Director, supported by a sufficient staff, who is nonetheless subject to various checks and balances; a comparatively high degree of openness; and ultimate responsibility in the Minnesota Supreme Court.

So long as lawyers have a monopoly on the practice of law, through the unauthorized practice of law statutes and rules, and so long as the Minnesota Supreme Court certifies, through licensure, that lawyers are competent and trustworthy, a lawyer professional responsibility system will be needed to guide, correct, admonish, and ultimately, to exclude lawyers based on professional responsibility considerations. So long as the profession seeks to maintain its ancient and honorable traditions, debate and guidance will be needed about the application of the profession’s standards to ever-changing, contemporary circumstances. And, to echo Dean Pirsig, so long as the ultimate good sought by the profession cannot be embodied in mere rules, voices will be needed to restate and renew the profession’s basic beliefs about itself and its mission.